IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 199 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAZIR IBRAHIM MERCHANDANI - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MS JAYSHREE C BHATT for Appellant(s) : 1,
MR HL JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 19/10/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.0 This appeal is directed against the judgment and order dated 28.12.1998 passed by the learned Addl. Sessions Judge, Junagadh in Sessions Case No.76 of 1996 whereby, the appellant – original accused was convicted for the offence punishable u/s. 302 of the Indian Penal Code [for short, "the I.P.C."] and acquitted for the offence punishable u/s. 135 of the Bombay Police Act. For conviction u/s. 302 of the I.P.C., the appellant was sentenced to undergo imprisonment for life with fine of Rs.1000/- and in default of payment of fine rigorous imprisonment for a further period of six months. The appellant was also given the benefit of set-off.

2.0 The brief facts of the prosecution case are as under;

2.1 On 17.01.1996, at around 1400 hrs., the appellant herein went to the house of his brother – Salimbhai in order to demand an amount of Rs.12,000/-

from Zahidaben – wife of Salimbhai, for making payment of the said amount to his wife who had filed an application against him u/s. 125 of the Code of Criminal Procedure before the Court of learned J.M.F.C., Gondal. At that time, the younger sister of Zahidaben – deceased Nasimaben was also present in the house. When the appellant asked for the said amount, deceased – Zahidaben refused to pay the same on account of which the appellant got enraged. In the process, the appellant took out a knife which he had brought along with him and inflicted blows on the body of deceased – Zahidaben.

2.2 On noticing the same, deceased – Nasimaben tried to rescue deceased – Zahidaben. During that process, the appellant also inflicted knife blows on the body of deceased – Nasimaben. As a result of the aforesaid incident, both deceased Zahidaben and Nasimaben sustained severe bodily injuries and both succumbed to their injuries on the spot.

2.3 On hearing the shouts of the deceased persons, a

neighbour of the deceased, the complainant herein, reached the scene of offence and on noticing the dead bodies of the deceased persons lying on the ground in a badly bruised condition, she telephonically informed about the same to the P.S.O. of Junagadh Police Station. On receipt of the said information, the P.S.O. noted down the same in the Station Diary and, thereafter, handed over a '*yaadi*' to P.S.I. one G. N. Vyas for carrying out necessary investigation into the incident in question.

2.4 The Investigating Officer went to the scene of offence and performed inquest '*panchnama*' of the two dead bodies. '*Marnottar*' forms were filled up and necessary arrangements were made for sending the dead bodies for performing post-mortem. A complaint with respect to the aforesaid incident was also recorded by the Investigating Officer, which was then sent to the P.S.O., who registered the same as I – C. R. No. 12 of 1996 for offences punishable u/s. 302 of the I.P.C. and u/s. 135 of the Bombay Police Act vide Station Diary Entry No. 16 before Junagadh Taluka Police Station.

2.5 In the meanwhile, the Investigating Officer carried out '*panchnama*' of the scene of offence and also intimated about the said incident to the officials of the Forensic Science Laboratory [F.S.L.]. After reaching the place of incident, the officials of the F.S.L. collected necessary '*muddamal*' articles, including control mud. The clothes worn by the two deceased persons, at the time of the incident in question, were also seized. Thereafter, the '*muddamal*' articles so collected were sent to the F.S.L. for examination. On receipt of the F.S.L. Report, PM notes and other reports of the deceased persons, the same were kept in the investigation file.

2.6 Further investigation was carried out and statements of several witnesses were recorded. On the same day i.e. on 17.01.1996, the appellant surrendered himself to the custody and also produced the '*muddamal*' knife used in the commission of the alleged offence in question. The clothes worn by the appellant at the relevant point of time and the knife alleged to have been used in the commission

of the offence in question were seized by way of a separate '*panchnama*'.

2.7 On completion of the investigation, charge-sheet was filed against the appellant in the Court of learned Chief Judicial Magistrate, First Class, Junagadh. Since the case was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, First Class, Junagadh committed the case to the Sessions Court, Junagadh and the same was numbered as Sessions Case No. 76 of 1996. As the appellant pleaded not guilty to the said charge, trial was conducted against him.

3.0 The prove the guilt against the appellant, the prosecution has examined in all twenty witnesses viz. PW – 1 Hansaben Jayantilal Bakraniya at Exhibit – 12, PW – 2 Kishorbhai Mulshankar Vyas at Exhibit – 13, PW – 3 Parvin Salimbhai at Exhibit – 14, PW – 4 Samakhatun Salimbhai Meer at Exhibit – 15, PW – 5 Samimba Haasambhai Parmar at Exhibit – 16, PW – 6 Mahmadbhai Alibhai Parmar at Exhibit – 17, PW – 7 Dr. Bhagwatiprasad Sukhrambhai

Nimavat at Exhibit – 18, PW – 8 Dr. Nikhilkumar Pushpakrai Buch at Exhibit – 24, PW – 9 Bharatbhai Dharamsinhbhai Gardhariya at Exhibit – 29, PW – 10 Shardaben Jagjivanbhai Unnadkat at Exhibit – 30, PW – 11 Ilija Haasambhai Parmar at Exhibit – 31, PW – 12 Aminaben Ibrahimbhai Chandani at Exhibit – 32, PW – 13 Jayantilal Naran Vekariya at Exhibit – 33, PW – 14 Javedbhai Musabhai Memon at Exhibit – 35, PW – 15 Raziaben Nazirbhai Chandani at Exhibit – 46, PW – 16 Salimbhai Ibrahimbhai Meer at Exhibit – 50, PW – 17 Dr. Ashok kumar Laxmidas Somani at Exhibit – 51, PW – 18 Gopal Tapubhai Solanki at Exhibit – 55, PW – 19 Uttambhai Nathubhai at Exhibit – 57 and PW – 20 Gunvantrai Nandlal Vyas at Exhbit – 63.

3.1 The prosecution had also relied upon several documentary evidence, more particularly, the evidence in the form of complaint at Exhibit – 80, the inquest '*panchnama*s' at Exhibits – 37 & 38, the '*panchnama*' of the scene of incident at Exhibit – 34 and the PM Notes of the deceased persons.

3.2 On submission of the closing 'purshis', the further statement of the appellant was recorded u/s. 313 of the Code of Criminal Procedure, 1973. After hearing learned counsel for the respective parties, the learned Addl. Sessions Judge passed the impugned judgment and order convicting the appellant for the offences as narrated in the earlier part of this judgment. Hence, the present appeal.

4.0 Ms. Jayshree C. Bhatt learned Advocate for the appellant – accused has submitted that the entire case of the prosecution rests upon the evidence of PW – 3 Parvin Salimbhai Mir at Exhibit – 14, daughter of deceased – Zahidaben, who was aged five years when the alleged incident in question took place and seven years when her evidence was recorded by the Court below.

4.1 Learned Advocate has submitted that the Court below, after considering the entire evidence on record, has come to the conclusion that the child witness was an eye-witness to the alleged incident in question though there are

several contradictions in the evidence led by this witness. She has contented that the police statement of the child witness was recorded after a delay of one day and, therefore, the same could not be fully relied upon, as her evidence is found to be a tutored one on close scrutiny. She has, therefore, submitted that the Court below has committed serious error in law and on facts in recording the conviction of the appellant on the basis of the evidence of the child witness at Exhibit – 14.

4.2 Learned Advocate for the appellant has relied upon a decision of the Apex Court in the case of ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat*** reported in ***(2004) 1 S.C.C. 64*** and, more particularly, on the observations made in Para 7, which reads as under ;

> *""7. In Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 S.C.C. 341] it was held as follows :*
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> > *"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered*

under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his / her demeanour must be like any other competent witness and there is no likelihood of being tutored".

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that its conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle is the way of accepting the evidence of a child witness"".

4.3 Learned Advocate for the appellant has contented

that the Court below has committed serious error in relying upon the evidence led by other prosecution witnesses, more particularly, on the evidence of PW – 5 Samimba Hasambhai Parmar at Exhibit – 16, though she has been declared as 'hostile'. She has further contented that the evidence led by the two police officials viz. PW – 19 Uttambhai Nathubhai at Exhibit – 57 and PW – 20 Gunvantrai Nandlal Vyas at Exhibit – 63 also does not inspire any confidence. She has, therefore, contented that when the evidence of the child witness at Exhibit – 14 is not found to be reliable and trustworthy and when other key-witnesses have been declared as 'hostile', then the Court below ought not to have convicted the appellant for the alleged offence in question.

5.0 Mr. H. L. Jani learned APP has submitted that looking to the entire oral as well as documentary evidence available on record, the Court below was completely justified in convicting the appellant for the alleged offence in question. He has submitted that the evidence led by the child witness viz. PW – 3 Parvin Salimbhai at Exhibit – 14 is reliable and trustworthy as the same is supported by the

evidence led by PW – 4 Samakhatun Salimbhai Mir, PW – 5 Samimba Hasambhai Parmar at Exhibit – 16 and PW – 11 Ilija Hasambhai Parmar at Exhibit – 31.

5.1 Learned APP has further submitted that the medical evidence on record in the form of depositions of the two Medical Officers viz. PW – 9 Dr. Bhagwatiprasad Sukhrambhai Nimawat at Exhibit – 18 and PW – 17 Dr. Ashokkumar L. Somani at Exhibit – 51 and the PM notes of the deceased at Exhibits 23 & 28 clearly point towards the guilt of the appellant. He has further submitted that the F.S.L. and Serological Report also support the case of the prosecution. He has, therefore, submitted that the Court below was completely justified in convicting the appellant for the alleged offence in question.

6.0 Having heard both the sides, it appears that the entire case of the prosecution rests upon the evidence of the sole child witness viz. PW – 3 Parvin Salimbhai Mir at Exhibit – 14. *Whether the evidence led by the child witness at Exhibit – 14 is reliable or not is the question that is*

required to be considered by this Court in order to decide this appeal ? It is an established principle that child witnesses are dangerous witnesses as they could be influenced easily but, if after careful scrutiny the Court comes to the conclusion that the evidence led by such witness is truthful, then the same could be relied upon for recording conviction.

7.0 In her deposition PW – 3 has stated that on the date of the incident, she was at the house of one of her relatives - Hasambapu and that her mother, deceased Zahidaben, was at their home. At that time, the appellant came to the house of Hasambapu and asked her as to whether she desired to go to her home, as he was going to their home, to which she replied in the affirmative. On hearing the same, the daughter of Hasambapu – Firoza told her that she would accompany her to her home. Accordingly, she and Firoza proceeded towards her home and when they reached near the well, which is situated on their way to home, they met the appellant. At that time, the appellant told Firoza that she could return to her home and that the appellant would accompany Parvin (PW – 3).

Accordingly, Firoza returned to her home and she and the appellant proceeded towards her home.

7.1 After they reached home, the appellant told her to ring the bell and give a call to her mother (deceased – Zahidaben) to open the door. The same was done by her and her mother, deceased Zahidaben, opened the door. At that time, the appellant caught hold of her mother, deceased Zahidaben, by her hair and, thereafter, stabbed her with a knife after pushing her down on a heap of sand. Thereafter, she proceeded towards the house of Hasambapu. On her way, she met her sister, Samakhatun Salimbhai Mir (PW – 4), who was returning home after attending the school. At that time, she informed about the said incident to her sister. Thereafter, she went to the house of Hasambapu and informed about the said incident.

7.2 She has further deposed that Nasimben – younger sister of deceased Zahidaben was at their home at the relevant point of time and that she was unaware as to what had happened to Nasimben. She has also categorically

deposed that at the relevant point of time, her mother – deceased Zahidaben had wore pink colored dress and the appellant had wore white colored clothes.

7.3 In her cross-examination, she has categorically stated that the police had made necessary enquiry only when her father had returned home two to three days after the incident in question had taken place. However, in her police statement, she has narrated a completely different version of the entire incident. She has stated that when she came out of their house, she noticed that her mother, deceased – Zahidaben, was lying dead on a heap of sand.

8.0 Here, it may be noted that at the time when the alleged incident in question had taken place, the child witness (PW – 3) was aged five years and that at the time when her evidence was recorded by the Court below, she was aged seven years. Now, if we go through her statement recorded by the police and compare the same with the evidence led by her before the Court below in the form of her deposition at Exhibit – 14, then it is evident that there are

several contradictions between the two.

8.1 Keeping in mind the fact that the child witness (PW – 3) was aged five years at the time when the incident in question had taken place and that her statement was recorded by the police on the next day only, it is quite probable that the evidence led by her in the form of police statement could be a tutored one. When an occasion to examine the evidence led by a child witness arises, then the trial Judge is the best person since the trial Judge has the opportunity to ascertain as to whether the child witness has sufficient intelligence to depose as he could notice his / her manners, his / her apparent possession or lack of intelligence. The trial Judge could also resort to any examination which will tend to disclose his / her capacity and intelligence as well as his / her understanding of the obligation of an oath.

8.2 In the present case, it is a matter of record that there are several contradictions in the evidence led by the child witness (PW – 3) in the form of her police statement

and in the form of her deposition before the Court below at Exhibit – 14. Hence, in view of the principle laid down in *Ratansinh Dalsukhbhai Nayak's* case (supra), we are of the opinion that the trial Court has committed serious error in relying upon her evidence for recording conviction. On close and careful scrutiny, the evidence led by the child witness (PW – 3) appears to be influenced / tutored one.

9.0 It is a matter of record that in spite of the aforesaid contradictions in the evidence led by the child witness (PW – 3), the Court below has proceeded further by stating that her evidence gets support from the evidence led by other prosecution witnesses. It may be noted that the witnesses, whose reference has been made by the Court below by stating that their evidence supports the evidence led by the child witness (PW – 3), have been declared as 'hostile'. Three such witnesses who have been declared as 'hostile' by the Court below and on whose evidence the Court below has placed heavy reliance are PW – 4 Samakhatun Salimbhai Mir at Exhibit – 15, PW – 5 Samimba Hasambhai Parmar at Exhibit – 16 and PW – 11

Ilija Hasambhai Parmar at Exhibit – 31. On close and careful scrutiny, it clearly transpires that the evidence led by neither of these witnesses support the case of the prosecution. The evidence led by the complainant, PW – 1 Hansaben Jayantilal Bakraniya at Exhibit – 12, is also of no benefit to the prosecution case as she has also been declared as 'hostile'.

9.1 Even if we believe the evidence led by the aforesaid three 'hostile' witnesses in their chief-examination to be true, then also the only conclusion that would come to the fore is that prior to the time when the alleged incident had taken place, the child witness (PW – 3) was at the residence of PW – 5, Samimba Hasambhai Parmar and that, at that time, the appellant had come there and had been at her residence i.e. of PW – 5, for about an hour.

9.2 Except the above, no other conclusion is possible from the evidence led by the said three witnesses much less pointing towards the guilt of the appellant. Thus, in our opinion, the trial Court has committed serious error in

relying upon the evidence led by the three 'hostile' witnesses.

10.0 Apart from the above, the evidence led by the investigating agency in the form of depositions of the P.S.O., PW – 19 Uttambhai Nathubhai at Exhibit – 57 and the Investigating Officer, PW – 20 Gunvantrai Nandlal Vyas at Exhibit – 63 also do not support the case of the prosecution.

10.1 In his deposition at Exhibit – 57, P.S.O. - Uttambhai Nathubhai has stated that on 17.01.1996, at around 1500 hrs., the appellant voluntarily surrendered himself to the custody and that, at that time, the appellant had also produced the knife alleged to have been used by him in the commission of the offence in question. He has admitted that he had not carried out any legal formalities with regard to the aforesaid incident though he was aware that it was a cognizable offence. He has also deposed that when the Investigating Officer (PW – 20 Gunvantrai Nandlal Vyas) had arrived at the Police Station, he had handed over the custody of the appellant to him but, at that time, the

Investigating Officer also had not completed the necessary legal formalities regarding the same. Thereafter, the Investigating Officer proceeded towards the place of incident and returned to the Police Station only after 1930 hrs..

10.2 In short, according to the evidence led by PW – 19 Uttambhai Nathubhai at Exhibit – 57, the appellant was in the company of the Investigating Officer from 1500 hrs. - 1930 hrs., during which period the Investigating Officer was at the scene of offence carrying out necessary legal formalities. The said fact is admitted by the Investigating Officer himself in his deposition as PW – 20 at Exhibit – 63.

10.3 Thus, it is evident that though the appellant had surrendered himself to the custody along with the knife alleged to have been used by him in the commission of the offence in question at around 1500 hrs., no legal formalities regarding arrest '*panchnama*' etc. was performed by the investigating agency at that point of time.

11.0 PW – 18 Gopal Tapubhai Solanki at Exhibit – 55

is a '*panch*' witness of the arrest '*panchnama*' at Exhibit – 56. It may be noted that the said '*panchnama*' was actually performed between 2000 hrs. - 2030 hrs. on the date of the alleged incident in question. This witness has also not supported the case of the prosecution. He has, however, specifically stated that at the time when his signature was taken in the said '*panchnama*', no other person, except the police officials, were present in the Police Station and that nothing was recovered from anyone in his presence.

11.1 Thus, if we consider the evidence led by this witness in light of the evidence led by the two police officials viz. PW – 19 Uttambhai Nathubhai at Exhibit – 57 and PW – 20 Gunvantrai Nandlal Vyas at Exhibit – 63, we find strong reasons to believe that when this witness had gone to the Police Station at around 1600 hrs., neither the appellant was present nor anything was recovered from anyone much less the appellant. Thus, it is established that the arrest '*panchnama*' was not prepared at the time when the appellant had actually surrendered to the custody i.e. at around 1500 hrs., which shows that there were serious

lapses in the manner the investigation was carried out by the investigating agency.

12.0 It is true that blood stains were found on the clothes of the appellant as also on the knife alleged to have been used by the appellant in the commission of the offence in question. Both these '*muddamal*' articles viz. clothes and knife were voluntarily produced by the appellant before the investigating agency and both contained blood stains of Blood Group 'A'. It is a matter of record that the Blood Group of both the appellant and the deceased persons is 'A'.

12.1 The Medical Officer, Dr. Ashok kumar Laxmidas Somani, who had treated the appellant on the date of incident, has been examined as PW – 17 at Exhibit – 51. In his deposition, he has stated that when the appellant was examined by him on the date of the alleged incident at around 2130 hrs., the appellant was bleeding from one of the fingers of his left hand.

12.2 Thus, from the medical evidence, it is clear that

the said injury sustained by the appellant on his left hand was a fresh one. If the injury in question would have been sustained by the appellant during the alleged scuffle that had taken place at around 1345 hrs., then bleeding would not continue up to 2130 hrs. In that view of the matter, the possibility could not be ruled out that the said injury would have been sustained by the appellant, at any time, after the alleged incident in question had taken place. Hence, the contention raised by the prosecution that the '*muddamal*' articles viz. clothes and knife contained blood stains belonging to the deceased persons does not hold any ground and deserves to be rejected in view of the aforesaid discussion. Simply because the '*muddamal*' articles in question showed the existence of blood stains similar to the Blood Group of the deceased persons, the appellant could not be held guilty for the alleged offence in question.

13.0 So far as the so-called “extra-judicial confession” made by the appellant before a third party, in the form of the letter at Exhibit – 48 is concerned, we are unable to accept the finding arrived at by the Court below regarding

the same. It appears that the said finding has been arrived at on the basis of mere assumptions and presumptions.

13.1 In her cross-examination, the wife of the appellant, PW – 15 Raziaben Nazirbhai Chandani at Exhibit – 46, has stated that there was no mark / remark either on the said letter or on the envelope, meaning thereby, that the said letter at Exhibit – 46 was not 'censored' by the jail authority. Hence, it has to be said that the conclusion arrived at by the Court below regarding the same is on presumption only and not on the basis of any evidence. Apart from the above, the prosecution has also not been able to show that there was motive, if any, behind the commission of the alleged offence in question by the appellant.

14.0 In view of the above discussion, we are of the opinion that the prosecution has failed to prove beyond doubt the guilt of the appellant. It is true that the alleged incident is a heinous act which has taken place in broad day-light and that to in a thickly populated area. But, in

view of the absence of any cogent and convincing evidence on record pointing towards the guilt of the appellant, we have no other alternative but, to acquit the appellant by granting him the benefit of doubt.

15.0 For the foregoing reasons, the appeal is allowed. The impugned judgment and order dated 28th December, 1998 passed by the learned Addl. Sessions Judge, Junagadh in Sessions Case No. 76 of 1996 is quashed and set aside. The appellant – accused is acquitted of the charge levelled against him. The appellant – accused is in jail and, therefore, the jail authority is directed to release the appellant – accused from the custody forthwith, if he is not required in any other offence.

[R. P. DHOLAKIA, J.] [K. S. JHAVERI, J.]

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